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No. 07-233

FILED

OCT 3 - 2007

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SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

DANIEL CRAWFORD,

Petitioner,

v.

CITY OF FAIRBURN, GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY TO BRIEF IN OPPOSITION

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THIS CASE PRESENTS AN IMPORTANT AND WELL-ESTABLISHED CONFLICT AMONG THE LOWER COURTS

Respondent's descriptions of the state of the law in the lower courts, and of the standard in the Eleventh Circuit from which this case arises, are simply inaccurate. Respondent insists that all the lower courts to address the issue have agreed upon a single formula for deciding cases in which an employer offers multiple reasons for an allegedly discriminatory act. First, according to respondent, if the multiple reasons are "intertwined," all lower courts agree that rebuttal of one reason will suffice to rebut the rest. (Br. Op. 24-25). Second, respondent insists, if the employer has changed its articulated reasons, all lower courts agree that rebuttal of one reason will suffice to rebut the rest. (Br. Op. 24, 26). Third, respondent contends, if neither of these circumstances is present, all lower courts agree that each proffered reason must be separately rebutted. (Br. Op. 23-27). In fact, however, the particular formulation now proposed by respondent is different from the standard

in any of the seven circuits to have addressed this issue, as well as from the standard applied in federal cases by the Mississippi Supreme Court.

The characterization which respondent offers in this Court of the standard in the Eleventh Circuit differs sharply from the manner in which respondent described Eleventh Circuit precedent in the proceedings below. Respondent insisted in both the District Court and the Court of Appeals that Eleventh Circuit precedent flatly required separate rebuttal of every proffered reason.[1] Respondent's earlier

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[1]The magistrate judge found that Crawford had rebutted two reasons articulated by the city, but concluded that Eleventh Circuit caselaw required that summary judgment be awarded to the defendant because the plaintiff had failed to rebut "all" the proffered reasons. (Pet. App. 74a). The magistrate judge believed that result was mandated by the Eleventh Circuit decisions in *Chapman v. AI Transport*, 229 F. 3d 1012, (11th Cir. 2000) and *Combs v. Plantation Patterns*, 106 F. 3d 1519 (11th Cir. 1997) (Pet. App. 74a).

Respondent urged the District Judge to uphold the award of summary judgment because "[t]he Magistrate Judge correctly concluded that Plaintiff failed to show pretext as to *each of* these reasons. See Combs, 106 F. 3d at 1429; Chapman, 229 F. 3d at 1024-25." (Defendant's Response to Plaintiff's Objections to Magistrate Judge's Report and Recommendation, 23-24)(emphasis added).

> [T]he City is entitled to Judgment as a matter of law on Plaintiff's Title VII/Participation Clause

> claim on the grounds that Plaintiff failed to demonstrate pretext as to *the majority* of the legitimate, non-retaliatory reasons articulated by the City for the termination decision. . . . See Chapman v AI Transport, 229 F. 3d 1012 (11th Cir. 2000)(*en banc*)("[T]o avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that *each* of the employer's proffered discriminatory reasons is pretextual"); Combs v. Plantation Patterns, 106 F. 3d 1519, 1539-43 (11th Cir. 1997)(requiring employee to rebut "*all of* the defendant's proffered nondiscriminatory reasons for its actions to avoid judgment as a matter of law.)

(Defendant's Objections to Report and Recommendation of Magistrate Judge, 18-19)(emphasis added).

> The city notes that to demonstrate pretext, a plaintiff's burden is "to demonstrate the existence of a genuine issue of fact as to the truth of each of the [defendant]'s proffered reasons for its challenged action. Combs v. Plantation Patterns, 106 F. 3d 1519, 1529 (11th Cir. 1997)(emphasis supplied).

(*Id.* at 19 n. 11.)

On appeal the city again noted that it had offered multiple reasons for firing the plaintiff, and insisted that the plaintiff was required to show pretext as to each of these reasons. *See Combs v. Plantation Patterns*, 106 F. 3d 1519, 1529 (11th Cir. 1997)(The Plaintiff's burden is "to demonstrate the existence of a genuine issue of fact as to the truth of *each of* the [defendant]'s proffered reasons for its challenged action.") *Chapman v. AI Transp.*, 229 F. 3d 1012, 1024-25 (11th Cir. 2000)("If the Plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether *each of* the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim.") *See also Cooper v. Southern Co.*, 390 F. 3d 695, 725-26 (11th Cir. 2004).

> Brief of Defendant-Appellee City of Fairburn, p. 45)(emphasis added).

description of Eleventh Circuit law was the correct one. In seven different decisions the court of appeals has announced a per se separate-rebuttal standard that contains neither of the exceptions that respondent insists are somehow part of Eleventh Circuit jurisprudence.

> If the employer proffers more than one legitimate nondiscriminatory reason, the plaintiff must rebut *each of the reasons* to survive a motion for summary judgment.[2]
>
> In order to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that *each of* the employer's proffered reasons was pretextual.[3]
>
> [E]ven if [the plaintiff could discredit one of the reasons . . . offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that *each of* [the employer's

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[2]Pet. App. 7a (emphasis added).

[3]*Chapman v. AI Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(emphasis added). Respondent quoted this holding in its briefs in the courts below. See n. 1, *supra*.

proffered] reasons was pretextual.[4]

A plaintiff in a discrimination case based on circumstantial evidence can avoid judgment as a matter of law by putting on a prima facie case and by producing evidence sufficient to discredit in the mind of a reasonable juror *all of* the defendant's proffered nondiscriminatory reasons for its actions.[5]

Where multiple reasons are advanced, the plaintiff must show that *each reason* was a pretext.[6]

[T]o avoid summary judgment, the plaintiff must produce sufficient evidence for a reasonable fact-finder to conclude that *each of* the employer's proffered reasons is pretextual.[7]

[E]ven though [one proffered] reason was not totally accurate, summary judgment

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[4]*Cooper v. Southern Co.*, 390 F. 3d 695, 730 (11th Cir. 2004)(emphasis added). Respondent cited this passage in *Cooper* in the courts below. See n. 1, *supra*.

[5]*Combs v. Plantation Patterns*, 106 F. 3d 1519, 1543 (11th Cir. 1997)(emphasis added). This passage was quoted by respondent in the courts below. See n. 1, *supra*.

[6]*Bojd v. Golder Associates, Inc.*, 212 Fed. Appx. 860, 862 (11th Cir. 2006)(emphasis added).

[7]*Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 (11th Cir. 2006)(emphasis added).

> is still appropriate due to [the plaintiff's] failure to demonstrate that *the remainder* of the defendant's proffered reasons were pretextual.[8]

In this Court respondent suggests that the Eleventh Circuit has adopted the "intertwined" standard utilized in the First, Sixth, Seventh and Tenth Circuits (although not in the Third Circuit or the Mississippi Supreme Court). (Br. Op. 24; see Petition 12-19). Respondent bases that assertion solely on a single passage in *Bojd v. Golder Assocs.*, 212 Fed. Appx. 860, 863 (11th Cir. 2006): "The incidents were cited as specific examples of continuing problems and not independent reasons for Bojd's termination." This passage has nothing whatever to do with the issue of whether a plaintiff must separately rebut every proffered reason; the plaintiff in that case did not claim to have directly rebutted any proffered reasons. The passage in question actually occurs in the court's analysis of a factual

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[8]*Champ v. Calhoun County Emergency Management Agency*, 2007 WL 879846 *7 (11th Cir. March 26, 2007)(emphasis added).

dispute about whether a supervisor was attempting to fabricate some new excuse for firing the plaintiff.[9]

Respondent contends that the Eleventh Circuit has also adopted the rule applied in the Tenth Circuit--although not in the First, Third, Sixth or Seventh Circuits--that rebuttal of one reason can call other proffered reasons into question if the plaintiff also

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[9]In *Bojd* a supervisor whose earlier recommendation of dismissal had not been accepted, later again recommended that Bojd be fired, which he was. The plaintiff had urged that the second recommendation was just a new excuse concocted by a supervisor who in fact was trying to get rid of Bojd because of religion. In the passage in question the court of appeals is merely explaining that the reasons in the second recommendation were not new at all, but rather a report that old problems had continued.

The context in which the passage in question occurs reads in full as follows:

> [The supervisor's later] memo cited a number of examples of Bojd's "total disregard, open defiance and complete lack of respect of management authority and decision making responsibilities." The occurrence of some of these incidents after [the supervisor] initially renewed his recommendation [of dismissal] does not raise a reasonable inference that [the supervisor] was attempting to cover up a discriminatory reason. The incidents were cited as specific examples of continuing problems and not independent reasons for Bojd's termination.
>
> 212 Fed. Appx. at 862 (footnote omitted).

shows that the employer has altered its reasons. For this characterization of Eleventh Circuit law respondent relies solely on the following passage in *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F. 3d 1286, 1298 (11th Cir. 2006): "an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext." But *Hurlbert*, like *Bojd*, was not a case in which a plaintiff, having rebutted some proffered reasons, sought to argue that that rebuttal also called into question the employer's remaining reasons. Rather, the plaintiff *Hurlbert* contended (successfully) that inconsistency in an employer's explanations was the type of evidence that would by itself call into question all of those reasons. 439 F. 3d at 1298-99.

The Fifth Circuit in five different cases has announced the same per se rule followed in the Eleventh Circuit. (Pet. 10-12). Respondent contends that the Fifth Circuit recognizes (like the First, Sixth, Seventh and Tenth) recognizes an exception for cases

in which an employer's proffered reasons are intertwined. (Br. Op. 24). Respondent relies on the phrase "cumulative effect" in *Laxton v. GAP, Inc.*, 333 F. 3d 572, 580 (5th Cir. 2003). But that phrase is merely part of the court's description of the position of the defendant employer, which asserted as a single reason for firing the plaintiff the company's unhappiness with a protracted period of rules violations..[10] Respondent notes that the phrase "independent reasons" appears in *Wallace v. The Methodist Hospital System*, 271 f. 3d 212, 222 (5th Cir. 2001). But there too the phrase is merely a description of the employer's assertion that (unlike

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[10]The phrase occurs, under the heading "proffered legitimate reason" (singular):

> Gap proffers that Laxton repeatedly violated store policy and alienated those who worked for her, the cumulative effect of which justified her termination. . . . The conduct occurred over a six-week period from July 8, 1999 to August 17, 1999. First . . . . Second . . . Third . . . . Fourth . . . . Gap asserts that Laxton's multiple violations were "too much, too soon."
> 333 F. 3d 572.

Laxton) it was proffering two reasons, not one.[11]

Four circuits--the First, Sixth, Seventh and Tenth--hold that rebuttal of one proffered reason calls into question the rest of the employer's proffered reasons if any of those explanations are "fishy" or "suspicious." (Pet. 14-19). Respondent does not contend that the Eleventh (or Fifth or Third) circuits apply this standard, but simply dismisses the standard as unworkable.

> The City submits that many of the so-called "exceptions" urged here by Crawford simply do not rise to the level of a judicially-manageable legal standard. . . . For example, redundancy aside, does "so fishy and suspicious," *see Jaramillo v. Colorado Judicial Dep't*, 427

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[11]271 F. 3d at 222 n. 14:

> We note that Methodist did not assert that these two acts together constituted a single nondiscriminatory reason for Wallace's termination. As a result, we have focused solely on what Wallace must show in order to rebut each of the independent reasons Methodist asserts.

In this passage "independent" merely indicates that the court accepts as controlling the employer's characterization of its actions as involving two reasons, rather than a single reason resting on two events.

> F. 3d 1303, 1311 (10th Cir. 2005) . . . constitute a discernable legal standard [?] . . . Simply put, mere wordplay fails to provide the parameters necessary for guiding the courts in the uniform and predictable application of the law so as to be elevated to the status of a legal standard.

(Br. Op. 22). Respondent appears to be suggesting that the Eleventh Circuit rule does not conflict with the "fishy and suspicious" standard in four other circuits because the "fishy and suspicious" formulation is so vague that it is not really a legal standard at all. But assuredly the Eleventh Circuit decision in the instant case is "in conflict with" the decisions in the First, Sixth, Seventh and Tenth Circuits adopting the "fishy and suspicious" standard, Sup. Ct. R. 10(a), regardless of the merits of that plurality rule.

Relying on similar reasoning, respondent specifically disagrees with the Tenth Circuit decisions in *Bryant v. Farmers Ins. Exch.*, 432 F. 3d 114 (10th Cir. 2005), *Jaramillo v. Colorado Judicial Dep't*, 427 F. 3d 1303 (10th Cir. 2005), and *Tyler v. RE/MAX Mt. States., Inc.* 232 F. 3d 808 (10th Cir. 2000), objecting

that the four additional standards which those decisions (but not the Eleventh Circuit) adopted are also unsound. (Br. Op. 22). But the standards adopted in these Tenth Circuit decisions, right or wrong, are assuredly different from the Eleventh Circuit decision in the instant case.

The Tenth Circuit, unlike the Eleventh (or any other) Circuit, holds that a plaintiff need not rebut all of an employer's reasons if "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *Jaramillo*, 427 F. 3d at 1310. Respondent contends that this difference between the Tenth and Eleventh Circuit standards does not matter because in *Jaramillo* itself the Tenth Circuit, although applying this objective-subjective standard, concluded that it was not satisfied in that case. (Br. Op. at 26). But the existence of an inter-circuit conflict under Rule 10 is determined by whether several circuits have announced different legal standards, not by which

party prevailed when those conflicting standards were applied. The objective-subjective standard in *Jaramillo* is controlling law in the Tenth Circuit and of necessity applied by district courts in that circuit.[12]

Unlike the Eleventh and Fifth Circuits (which always require separate rebuttal of each proffered reason) and unlike the First, Sixth, Seventh, and Tenth Circuits (which in some but not all cases permit rebuttal of one or more proffered reason to call into question the rest), the Mississippi Supreme Court in *Cash Distributing Co., Inc. v. Neely*, 947 So. 2d 286 (Miss. 2007) and the Third Circuit in *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988), have simply dispensed altogether with any separate

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[12]*Dusenberry v. Peter Kiewit Sons, Inc.*, 2007 WL 1346598 *5 (D. Colo. May 8, 2007)(quoting *Jaramillo*); *Belgasem v. Water Pik Technologies, Inc.*, 457 F. Supp. 2d 1205, 1214 (D.Colo. 2006)(quoting *Jaramillo*); *Trujillo v. Board of Educ. of Albuquerque Public Schools*, 2006 WL 4079032 *2 (D.N.M. July 9, 2006)(quoting *Jaramillo*); *EEOC v. Public Service Co. of Colo.*, 2006 WL 1215393 *4 (D. Colo. May 4, 2006)(denying summary judgment because of the *Jaramillo* objective-subjective standard); *Serrano v. Veneman*, 410 F. Supp. 2d 1049, 1060 (D.N.M. 2005)(quoting *Jaramillo*).

rebuttal requirement. (Pet. 13, 17-18). Respondent frankly acknowledges that holding in *Cash Distributing*[13] by the highest court in Mississippi, and makes no effort to explain away the Third Circuit decision in *Roebuck*.

These conflicting standards are of controlling importance in the instant case. The fact that Crawford discredited at least one of the reasons proffered by the employer would without more be sufficient to withstand summary judgment under the Mississippi Supreme Court decision in *Cash Distributing* and the Third Circuit decision in *Roebuck*. The district court and court of appeals agreed that Crawford had adequately rebutted one critical reason given for his dismissal, the city's objections to the depth and scope of Crawford's investigation of sexual harassment in the city Police

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[13]Br. Op. 14 n. 5 ("In *Cash Distrib. Co v. Neely* . . . the Mississippi Supreme Court specifically rejected [the Fifth Circuit decision in] *Wallace* and the general rule that the plaintiff prove pretext as to each reason articulated by the employer.")

Department. In the instant case, where the plaintiff alleges that he was fired in retaliation for opposing sexual harassment, an undisputed violation of section 704(a) of Title VII, dismissal for undue vigor in investigating sexual harassment assuredly meets the "fishy and suspicious" standards of the First, Sixth, Seventh and Tenth standards. Among the seven circuits and one state in which this important question of federal law has been resolved, Crawford would win in six (the First, Third, Sixth, Seventh and Tenth Circuits, as well as Mississippi) and would lose in two (the Fifth and Eleventh Circuits). Certiorari should be granted to resolve that well-established and multi-faceted conflict.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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